SUPREME COURT, U. S.

APR 10 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

_____ TERM

NO. 1248

JUNIUS GUILLORY, *Petitioner,*

v.

LEVINGSTON SHIPBUILDING COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS AND ACTION OF TEXAS SUPREME COURT

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LEVINGSTON SHIPBUILDING COMPANY,
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PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS AND ACTION OF TEXAS SUPREME COURT

Junius Guillory, Petitioner, prays that writ of certiorari issue to review the Judgment of the Court of Civil Appeals For the Ninth Supreme Judicial District of Texas, which judgment became final insofar as the state courts are concerned, by the action of the Texas Supreme Court in overruling Petitioner's Motion For Rehearing of Application For Writ of Error, on January 15, 1969.

CITATIONS OF OPINION BELOW

The opinion of the Court of Civil Appeals is the only reported opinion in this case, and it appears at 433 S.W.2d 515.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and under Supreme Court Rule 19(1) b. The Court of Civil Appeals for the Ninth Supreme Judicial District of Texas rendered its opinion and Judgment on September 19, 1968, and thereafter Petitioner's Application For Writ of Error was refused by the Texas Supreme Court on December 4, 1968, and Petitioner's Motion For Rehearing was overruled on January 15, 1969.

QUESTION PRESENTED

Does exclusive control of a vessel undergoing temporary repairs place a non-shipowner employer (ship repair company) in the same position as if it were the owner, so as to allow a harborworker employee to maintain a suit against his employer for damages resulting from personal injury caused by the unseaworthiness of the vessel and/or the negligence of his employer under the holdings of *Reed v. S. S. Yaka*, 373 U.S. 410, and *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731, notwithstanding the provisions of 33 U.S.C. 905?

STATUTE INVOLVED

Section 905 (33 U.S.C.) of the Longshoremen's and Harbor Workers' Compensation Act, printed in Appendix A.

STATEMENT OF THE CASE

This is a personal injury suit brought under the general maritime law of the United States. The suit was filed against Levingston Shipbuilding Company in the District Court of Orange County, Texas, rather than the Federal Court, under the "Savings to Suitors" clause (Title 28, Section 1333, U.S.C.). The plaintiff was injured in the course of his employment for the defendant while working aboard a tug which was owned by Harms Marine Service but was under the exclusive control of the defendant at the time of the plaintiff's injury, having been brought in for minor repairs which were completed in two days. Although Section 905 of the Longshoremen's and Harbor Workers Act (Title 33, Section 901-950, U.S.C.) provides that an employee's exclusive remedy for an on-the-job injury is under that act, this suit was brought under the express authority of the United States Supreme Court cases of *Reed v. S. S. Yaka,* 373 U.S. 410, and *Jackson v. Lykes Bros. Steamship Co., Inc.,* 386 U.S. 731. These cases specifically hold that a longshoreman may sue his employer when the employer also is the shipowner or bareboat charterer, notwithstanding Section 905, and it is the plaintiff's theory that when a ship repair company is in exclusive control of a vessel while repairing it, this puts the ship repair company in the same legal position as if it were the owner or bareboat charterer, and such company therefore becomes responsible to its employees to furnish a seaworthy vessel and to exercise due care for their safety.

The jury in this case found that the vessel on which plaintiff was working when injured was in the exclusive control of the defendant. The jury also found the defendant negligent and the vessel unseaworthy, and that both such negligence and unseaworthiness proximately caused plain-

tiff's damages in the amount of $65,000.00 The Trial Court granted the defendant's Motion For Judgment Non Obstante Veredicto and rendered judgment that the plaintiff take nothing, and the plaintiff duly perfected his appeal from such judgment to the Court of Civil Appeals For The Ninth Supreme Judicial District of Texas.

The Judgment of the Trial Court was affirmed by the Court of Civil Appeals, and the opinion of that Court appears in 433 S.W.2d 515, and in Appendix C. The Petitioner then applied to the Supreme Court of Texas for a Writ of Error, and the Application was denied with the notation "Refused, No Reversible Error." Final action of the Texas Supreme Court came when it overruled Petitioner's Motion For Rehearing of Application For Writ of Error on January 15, 1969.

REASONS FOR GRANTING THE WRIT

This case is of tremendous importance, because its outcome will affect the rights of countless thousands of shipyard employees all over the country. In the everyday situation where a shipyard worker is injured while working aboard a vessel owned by a third party, but brought into his employer's drydock for temporary repairs between voyages, a suit against the vessel owner will be met with the defense that since the shipowner had no control whatsoever over the vessel at the time of injury, it is not liable. Therefore if a shipyard worker cannot sue his employer when that employer has exclusive control of the vessel, is it impossible for him to recover anything except benefits under the Longshoremen's and Harbor Worker's Act, even though his injury results from unseaworthiness and/or negligence?

It is true that the Longshoremen's and Harbor Workers Act has a provision (Title 33, Section 905, U.S.C.) providing for the act being the exclusive remedy of an employee against his employer. However, a departure from this exclusive remedy has been made in the field of longshoremen or harbor workers directly employed by shipowners or bareboat charterers (those who are in the exclusive control of the vessel), in a line of cases beginning with *Reed v. S. S. Yaka*, 373 U.S. 410 (United States Supreme Court 1963). The *Yaka* case, and the case of *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (United States Supreme Court 1967), specifically hold that a longshoreman may sue his employer when the employer is also the shipowner or bareboat charterer, in spite of Section 905. Since the longshoreman can do this, it of course follows that harbor workers such as tank cleaners, carpenters, engineers, etc. can do so, so long as they come into the category of "performing work traditionally done by seamen". In this connection, it has been held in *Pacific Inland Navigation Co. v. Course*, 368 F.2d 540 (Ninth Circuit 1966), that a shoreside marine electrician injured while working on his employer's tug has the right to sue his employer under the *Reed* and *Jackson* holdings. The Trial Court's opinion in that case, reported in 234 F. Supp. 676, makes it clear that being a "seaman" or "member of crew" is not the test. The Court says:

> "The defendant Pinco owns and operates barges and tugs, and shore facilities upon navigable waters, and the plaintiff Course is employed by Pinco as a harbor worker (marine electrician) on Pinco's tugs and barges, *at random as directed, as distinguished from being a member of a crew of any particular vessel*". (Emphasis Petitioner's)

There are numerous cases following the holding of *Reed v. Yaka,* 373, U.S. 410, including *Huff v. Matson Navigation Co.,* 338 F.2d 205 (Ninth Circuit 1964), *Scopaz v. S. S. Santa Lucia,* 372 F.2d 403 (Second Circuit 1967), and *Schell v. C. & O. RR Co.,* 264 F. Supp. 484. Two Texas cases following *Reed v. Yaka* are *Aycock v. Lykes Bros.,* 236 F. Supp. 360, an opinion by Judge Hannay in 1964, and *Terry v. Southeast Packing Co., Inc.,* 416 S.W.2d 624 (Houston CCA 1967, no writ history).

The above cases make it clear beyond any doubt that in spite of Section 905, Junius Guillory would have a good cause of action against Levingston if his injury had occurred on a vessel owned by Levingston, or under a demise or bareboat charter to Levingston. It is the Petitioner's theory that if the ship repair company is in complete and exclusive control of the vessel while repairing it, this puts the ship repair company in the same legal position as if it were the owner or bareboat charterer, and such company therefore becomes responsible to its employees to furnish a seaworthy vessel and to exercise due care for their safety. In other words, Levingston definitely would be liable to its employees for injuries sustained while repairing a vessel *owned by* Levingston, and there is no valid reason for the rule being any different when someone else owns the vessel but it is under the *exclusive control* of the ship repair company. If the rule is to be different, then a harbor worker's right to an adequate recovery for his injuries (for example, $65,000.00) would be dependent entirely on the question of whether he was working on a tug owned by his own employer or on a tug owned by someone else, at the time of his in-

jury. The United States Supreme Court said in *Reed v. Yaka,* 373 U.S. 410:

> "We think it would produce a harsh result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from the ship owner and others from a stevedoring company doing the ship's service."

The Court went on to say that a longshoreman - direct employee's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a non-owner stevedoring company. It is entirely reasonable then, that a harbor worker such a Junius Guillory has the same need for protection from unseaworthiness whether or not Levingston owns the vessel he is working on when injured, and it would be a harsh result to distinguish between liability to harbor workers injured under precisely the same circumstances because some are injured working on their employer's vessels and some are injured on vessels owned by others.

Indeed, a ship repair company which is in exclusive control of a vessel is in exactly the same position as a bareboat charterer. In the *Reed v. Yaka* opinion, at 373 U. S. 412, the Court says this:

> "Pan-Atlantic was operating the Yaka as demisee or bareboat charterer from Waterman. Under such arrangements *full possession and control* of the vessel are delivered up to the charterer for a period of time." (Emphasis Petitioner's)

In our case, *full possession and control* of the tug Lou Ann Ellis was delivered up to Levingston for a period of

time. There simply can be no valid distinction between the two situations. In the case of *Grace Line v. Kanton,* 366 F.2d 510 (Ninth Circuit 1966), the court said:

> "The Supreme Court in *Yaka* found in effect that the bareboat charter made the stevedore employer the owner of the boat for the duration of the bareboat charter."

It follows that the turning over of the tug Lou Ann Ellis to the exclusive control and possession of Levingston made Levingston in effect the "owner" of the vessel for the duration of the repairs, and thus made Levingston answerable for injury on the vessel resulting from unseaworthiness or negligence.

The Court of Civil Appeals opinion attempted to place its own limitation on the *Reed* and *Jackson* holdings, by its statement on page 8 of its opinion:

> "In the above decisions of the Federal Court, the plaintiff sued legal entities having full possession and control of the vessel, not just possession and control of the vessel for the purpose of repairs."

As far as the writer can determine, there is no reported case in the United States to authorize or justify the above limitation and distinction. The Court of Civil Appeals has thus completely ignored the opinion in the case of *Lawlor v. Socony Vacuum Oil Co.,* 275 F.2d 599, where the degree of control by a ship repairer (Bethlehem Steel Co.) was the question involved. In our case, Levingston was in exclusive control of the vessel when Guillory was injured, and it is immaterial whether Levingston was repairing, loading, unloading, or cruising the vessel while it had such exclusive control.

The case of *Watson v. Gulf Stevedore Corp.*, 374 F. 2d 946 (Fifth Circuit 1967) is not in point, because there a longshoreman sued his employer-stevedore who was *not* in control of the vessel, but merely had some men on board loading when the injury occurred. The shipowner in that case still had a crew on board and was in control of the vessel, therefore making it, rather than the employer, answerable for unseaworthiness and negligence.

A case in which the Court held that a *lessee* of a vessel could be in the same legal position as the owner, is *Smith v. Standard Fruit & Steamship Co., Inc.*, 277 F. Supp. 956 (U. S. District Court S.D. New York, December 15, 1967). Since a lessee can become subject to a *Reed v. Yaka* type suit because it is in control of a vessel, then it of course follows that a ship repair company in exclusive control of the vessel should also be subject to such a suit.

Numerous statements in the opinion by the Court of Civil Appeals make it clear beyond doubt that the members of that Court feel that when a vessel goes into drydock for temporary repairs, it is "out of navigation." This simply is *not* the law. This point was decided long ago in *Carumbo v. Cape Cod S. S. Co.*, 123 F.2d 991 (First Circuit 1941), in which the court stated:

> "A ship is in navigation, however, when it returns from a voyage and is taken into dry dock to undergo repairs preparatory to making another voyage."

The law is completely clear and unambiguous that a vessel brought into a shipyard for temporary repairs is still "in navigation" and does not become a "dead" vessel.

Just one of the many, many cases so holding is *Lawlor v. Socony Vacuum Oil Co.*, 275 F.2d 599 (Second Circuit 1960). Also see *Pacific Inland Navigation Company v. Course,* 368 F.2d 540, 542 (Ninth Circuit 1966); and *Hunt v. United States,* 17 F. Supp. 578. (Southern District of New York, 1936).

It is quite clear that Congress recognizes that a vessel in drydock is still "in navigation" under the law. The language of the Longshoremen's and Harbor Workers Act (Title 33, Section 903, U. S. C. A.) provides for recovery when the injury occurs "upon the navigable waters of the United States *(including any dry dock).*" (Emphasis Petitioner's)

Junius Guillory was working as a tank cleaner when injured (S.F. 42), and his job was to gas-free the tanks on the vessel (S.F. 14-15).

In *Lawlor v. Socony Vacuum Oil Co.*, 275 F.2d 599 (Second Circuit 1960), it was held that repairing leaks and cracks in the vessel was "work traditionally done by seamen." In *Pacific Inland Navigation Co. v. Course,* 368 F.2d 540 (Ninth Circuit 1966), a marine electrician who was shorebased and was sent to various tugs and barges to repair electrical defects, was held to be doing work "traditionally done by seamen." In *Pope and Talbot v. Hawn,* 346 U. S. 406 (U. S. Supreme Court 1953), a shoreside carpenter working to repair loading equipment was held to be doing work "traditionally done by seamen."

In *Halecki v. United New York and New Jersey Pilots Association,* 302 F.2d 840 (Second Circuit 1962), and in *Torres v. The Kastor and Its Owners,* 227 F.2d 664 (Second Circuit 1955), shipcleaners were allowed re-

covery because they were doing work "traditionally done by seamen."

In Norris, *Maritime Personal Injuries,* Second Edition, at page 114, the author recognizes that "gas-freeing the tanks", is work traditionally done by seamen.

The Court of Civil Appeals opinion indicates an absolute refusal to follow the established law on this point. The Court says: "He was not a seaman, for he was not exposed to the traditional perils of the sea." Obviously this is not the test, for a repairman, marine electrician, shoreside carpenter or shipcleaner injured while a ship is in drydock or tied up to a pier is not "exposed to the traditional perils of the sea." The Court also says: "This vessel was temporarily withdrawn from navigation, and seamen no longer had any duties to perform with respect to it." This is certainly wrong, because it was still in navigation, and because the only test is whether or not Junius Guillory was doing the type of work traditionally and historically done by seamen. It is clear that he was.

The evidence clearly shows that the Petitioner's injury resulted from the unseaworthiness of the vessel and the negligence of the Respondent, and proof of causation is abundant in the record. Therefore, the only real question involved is whether Petitioner can recover in this type suit against his employer, notwithstanding the Longshoremen's and Harbor Worker's Act.

It might be argued by Respondent that even though Harms Marine Service as shipowner had no control whatsoever over the vessel at the time of Guillory's injury, Guillory should have sued the shipowner and then have the shipowner implead Levingston for indemnification.

In this connection, the language in *Sanderlin v. Old Dominion Stevedoring Corporation,* 385 F.2d 79 (Fourth Circuit 1967), is appropriate, at page 82:

> "There can be no doubt that the stevedore is the appropriate enterprise within the maritime industry to bear the cost of this accident. Yet respondent argues that the only way it may be held liable in the admiralty courts is for Sanderlin to sue his employer, the shipowner, for the unseaworthiness resulting from improper stevedoring by Old Dominion and then for his employer to seek indemnification from Old Dominion. *This strikes us as needless and undesirable circuity.*" (Emphasis Petitioner's)

Certainly in our case Levingston is the appropriate enterprise to bear the cost of this accident, and not the shipowner who had no control whatsoever over the vessel at the time of the accident. To require Guillory to sue Harms Marine Service, and then have Harms Marine Service implead Levingston, is *"needless and undesirable circuity".*

In conclusion, the holdings of this Court in *Reed v. S. S. Yaka,* 373 U.S. 410, and *Jackson v. Lykes Bros. Steamship Co.,* 386 U.S. 731, and the holdings of the many Federal and state courts following *Reed* and *Jackson,* have paved the way for Petitioner and for thousands of other similarly situated employees to have the opportunity for an adequate recovery for an injury caused by unseaworthiness or negligence.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Wiley B. Thomas, Jr., attorney for petitioner and being a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition For Writ of Certiorari to Review Decision of the Court of Civil Appeals For The Ninth Supreme Judicial District of Texas and Action of Texas Supreme Court upon Mr. John D. Rienstra, counsel for respondent, by mailing three copies thereof postage prepaid, addressed to his office at 707 Beaumont Savings Building, Beaumont, Texas, dated this 9th day of April, 1969.

Wiley B. Thomas Jr
Wiley B. Thomas, Jr

APPENDIX A

§ 905. Exclusiveness of Liability

The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426.

APPENDIX B

NO. A-15890

JUNIUS GUILLORY

vs.

LEVINGSTON SHIPBUILDING COMPANY

IN THE DISTRICT COURT
OF
ORANGE COUNTY, TEXAS

JUDGMENT OF THE COURT

BE IT REMEMBERED that on the 9th day of October, 1967, came on for trial in its regular order the above entitled and numbered cause, the plaintiff, Junius Guillory, appearing in person and with his attorney, and the defendant, Levingston Shipbuilding Company, appearing through its attorney, whereupon all parties announced ready for trial.

Thereupon, a jury consisting of Euel H. Norwood, its foreman, and eleven other good, lawful and qualified citizens of Orange County, Texas, were duly selected, qualified and impaneled to try said cause, after which the pleadings were read, admissions introduced, certain stipulations made, the evidence adduced, Defendant's Motion for Instructed Verdict was timely filed and overruled, the Charge of the Court submitted upon Special Issues, and argument of counsel was had, following which, on October 11, 1967, the verdict of the jury in answer to Special Issues submitted to them was duly returned into open court, accepted by the Court and ordered filed.

Thereafter, the plaintiff, Junius Guillory, duly and timely filed his Motion for Judgment in his favor upon the verdict of the jury, and the defendant, Levingston Shipbuilding Company, duly and timely filed its Motion for Judgment Non Obstante Veredicto on the grounds that a directed verdict for said defendant, Levingston Shipbuilding Company, would have been proper and should have been granted, that reasonable notice of such motion was given as required by law to the plaintiff, and that on hearing of said motions for judgment on the verdict of the jury and for judgment non obstante veredicto, both parties came by their attorneys, and the Court having heard and considered such motions, the evidence and argument of counsel, and being of the opinion that a directed verdict for the defendant, Levingston Shipbuilding Company, would have been proper and that its Motion for Judgment Non Obstante Veredicto should be granted:

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that the motion of the plaintiff, Junius Guillory, for judgment in his favor upon the verdict of the jury be and the same is hereby overruled and denied, to which action of the Court the plaintiff then and there in open court excepted.

It is further ORDERED, ADJUDGED and DECREED by the Court that the motion of the defendant, Levingston Shipbuilding Company, for judgment non obstante veredicto be and the same is hereby granted, and that judgment non obstante veredicto be entered for the said Levingston Shipbuilding Company, wherefore it is accordingly ORDERED, ADJUDGED and DECREED that the plaintiff, Junius Guillory, do have and recover nothing of and from the defendant, Levingston Shipbuilding Company, and that said defendant go hence without day.

Costs of court are adjudged against the plaintiff, for which the clerk of the court may have execution if necessary.

To all of which the plaintiff then and there in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas.

SIGNED, RENDERED and ENTERED this the 1st day of December, 1967.

/s/ James N. Neff
District Judge Presiding

APPROVED AND AGREED TO:

/s/ John H. Seale
Attorney for Plaintiff

/s/ John D. Rienstra
Attorney for Defendant

APPENDIX C

NO. 6991

JUNIUS GUILLORY, *Appellant*

vs.

LEVINGSTON SHIPBUILDING COMPANY, *Appellee*

Junius Guillory sued Levingston Shipbuilding Company for personal injuries he sustained while working aboard the tug "Lou Ann Ellis," a vessel owned by Harms Marine Service. At the time of his injury, the plaintiff was an employee of Levingston. Levingston was a subscriber under the Texas Workmen's Compensation Act, Article 8306 et seq, Texas Revised Civil Statutes, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Section 901 et seq. The injury occurred while the tug was on a marine railway undergoing repairs. Such marine railway was owned and operated by Levingston. No crew of Harms Marine Service was aboard the tug while being repaired. All persons working on the tug were employees of Levingston. Harms Marine Service was not a party to the suit. The case was tried to a jury in the District Court of Orange County, Texas, which found for plaintiff Guillory in response to special issues. Levingston moved for judgment non obstante veredicto, and judgment was entered in accordance with such motion. The plaintiff Guillory will be designated as plaintiff or as appellant. The defendant Levingston will be designated as defendant or as appellee.

Construction of the Longshoremen's and Harbor Workers' Compensation Act controls the disposition of this appeal.

United States Code, Title 33, Section 901 and following, comprise the Longshoremen's and Harbor Workers' Compensation Act. Section 905 of that Act provides:

> The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. * * *

Sections 902 (2) and (4) provide:

> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
>
> * * *
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)

Section 903, Coverage, is:

> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's

compensation proceedings may not validly be provided by State law. * * *

In his first seven points of error, appellant contends the trial court erred in granting judgment non obstante veredicto for the defendant, . . .

1. because the plaintiff is not relegated to the exclusive remedy of the Longshoremen's and Harbor Worker's Act, since the employer-defendant was in exclusive control of the vessel on which plaintiff was working when injured, and defendant thereby stood in the stead of the owner and was subject to direct suit by its employee for negligence and/or unseaworthiness.
2. because the plaintiff has no remedy whatsoever under the Workmen's Compensation Act of the State of Texas.
3. because the plaintiff does have a maritime claim against the defendant without regard to whether or not he is a "seaman" or a member of the crew of a vessel.
4. because the vessel on which plaintiff was injured was on the marine way at Levingston for minor repairs, and was not a "dead" vessel, but on the contrary was still "in navigation" under the law.
5. because the plaintiff was performing work traditionally done by seamen at the time of his injury.
6. because there is evidence that the vessel on which plaintiff was working when injured was unseaworthy, and that such unseaworthiness was a proximate cause of his injury.
7. because there is evidence that the defendant was negligent, and that such negligence proximately caused the plaintiff's injury and his disability.

The Lou Ann Ellis was brought to the Levingston yard on September 6, 1966, for major repairs. The work order is as follows:

HARMS MARINE SERVICE
TUG "LOU ANN ELLIS"

9-9-66

JOB 1462

1. *Drydock:*
   Furnish labor & facilities to drydock vessel for underwater examination and repair. Hold on dock for completion of underwater work and undock vessel.
2. *Propellers:*
   Furnish labor & equipment to crop propeller nut keepers, remove propeller nuts and unship port & stbd. propellers from vessel to Levingston Shipbuilding Company truck for transportation to L. L. Walker, in Houston. Propellers to be repaired for owners account. Dial indicate port & stbd. propeller shafts and report findings to owners. Pick up propellers in Houston. Drill pull bolt holes. Deliver to vessel and reinstall as original. Harden up propeller nuts & install flat bar keepers.

Weakley

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HARMS MARINE SERVICE
TUG "LOU ANN ELLIS"

9-9-66

JOB 1462

3. *Port Rudder:*
   Furnish labor & facilities to disconnect port rudder at quadrant. Drop rudder & transfer to machine shop. Crop rudder blade, chuck in lathe and straighten stock. Add approx. 10" to lower end of rudder stock and weld out. Reinstall rudder blade as original and connect up to quadrant.
4. *Rudder Shoe & Gudgeon:*
   Furnish labor and material to crop & renew lower

angle on rudder shoe approx. 6 x 3 x 3/8 x 5'-0". Fabricate rudder shoe extension from after strut to rudder. Machine new gudgeon and install on shoe to suit rudder pintle.

5. *Packing Glands:*
Furnish labor & material to repack port & stbd. stern tube packing glands.

Weakley

1462

HARMS MARINE SERVICE
TUG "LOU ANN ELLIS"

9-9-66

JOB 1462

6. *Port & Stbd. Engines:*
Furnish labor & material to align and resecure port & stbd. engines on foundations using fitted bolts.

7. *Gasfree:*
Furnish labor & facilities to pump water from after void. Washdown & gasfree after void & after fuel tank for hot work.

8. *Gasfree Certificate:*
Furnish services of certified chemist to check vessel and issue necessary certificate for required hot work.

9. *Misc. Fractures & Doublers:*
Furnish labor & material to gouge & weld miscellaneous fractures at stern of vessel including struts and install doublers where necessary.

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10. *Blast & Paint:*
Furnish labor & material to sandblast vessel from keel to waterline. Furnish and apply two (2) coats

silver primocon & one (1) coat super tropical #2 antifouling.

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11. *Assist Radar Installation:*
Furnish labor to assist in installation of radar unit as requested.

12. *Zinc Pads On Fernstrom Coolers:*
Furnish labor & material to renew zinc pads on fernstrom coolers as requested by owners representative.

13. *Shaft:*
Furnish labor & equipment to break inboard coupling and unship port propeller shaft. Accept delivery of owners spare shaft and install as original. (Note - Item #5 covers repacking of gland).

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The tug was hauled out of the water on a marine railway on September 8, 1966. Repairs were completed and the tug was placed back into navigation on September 10, 1966. While on the way, none of the tug's crew was aboard. None of the crew assisted in the repair work. Guillory, at the time of his injury, was an employee of Levingston. The injury was alleged to be the result of inhaling gas fumes without a gas mask being furnished while working aboard the Lou Ann Ellis while it was in dry dock. He was performing work described in paragraph 7 of the work order. It is undisputed that the

vessel was in the Levingston yard solely for the purpose of repairs. Levingston had exclusive control of the vessel only for the purpose of repair. It had no right to control the use and operation of the vessel in navigation.

At the time of Guillory's injury, appellee was a subscriber under the Longshoremen's and Harbor Workers' Compensation Act and under the Texas Workmens' Compensation Act. Article 8306, Section 3, Texas Rules of Civil Procedure provides:

> The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association as the same is hereinafter provided for. * * *

The Federal Act and the State Compensation Act each prescribe an exclusive remedy for injuries suffered by an employee insofar as his employer is concerned. Employees injured on marine railways, which are located on land, may seek benefits under either the State or Federal Compensation Act. In *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 8 L.Ed.2d 368 (1962), in construing the scope of the Longshoremen's and Harbor Workers' Compensation Act, the court's conclusion is thus stated:

> * * * Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable

> waters, whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law.
>
> * * *
>
> The issue in Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366, 98 L.Ed. 77, (1953) was whether compensation was available under the Longshoremen's Act for the death of an employee killed while engaged in the repair of a vessel which was then physically located on land, but on a marine railway. Since a marine railway was considered to be a "dry dock," the injury satisfied Sec. 3(a)'s requirement that it occur "upon * * * navigable waters," defined in Sec. 3 as "including any dry dock." At the same time, since the injury did, in a physical sense, occur on land, there is little doubt that a state compensation act could validly have been applied to it. See State Industrial Com. v. Nordenholt Corp., 259 U.S. 263, 66 L.Ed. 933, 42 S.Ct. 473, 25 ALR 1013, 21 NCCA 862. * * *

See *Travelers Insurance Company v. Gonzalez,* 351 S.W. 2d 374 (Tex.Civ.App. 1961) error ref. N.R.E.; *Travelers Insurance Company v. Shea,* 382 F.2d 344 (5th Cir. 1967).

Appellant contends that he is entitled to bring the action as he did, to use his own language:

> This is a personal injury suit brought under the general maritime law of the United States. The suit was filed against Levingston Shipbuilding Company in the District Court of Orange County, Texas, rather than the Federal Court, under the "Savings to Suitors" clause (Title 28; Section 1333, U.S.C.A.). The plaintiff was injured in the course of his employ-

> ment for the defendant while working aboard a tug which was owned by Harms Marine Service but was under the exclusive control of the defendant at the time of the plaintiff's injury. Although Section 905 of the Longshoremen's and Harbor Workers Act (Title 33, Sections 901-905, U.S.C.A.) provides that an employee's exclusive remedy for an on-the-job injury is under that act, this suit was brought under the express authority of the United States Supreme Court cases of *Reed v. S. S. Yaka,* 373 U.S. 410, and *Jackson v. Lykes Bros. Steamship Co., Inc.,* 386 U.S. 731. These cases specifically hold that a longshoreman may sue his employer when the employer also is the shipowner or bareboat charterer, in spite of Section 905, and it is the plaintiff's theory that when a shipyard is in exclusive control of a vessel while repairing it, this puts the shipyard in the same legal position as if it were the owner or bareboat charterer, and such company therefore becomes responsible to its employees to furnish a seaworthy vessel and to exercise due care for their safety.

In *Reed v. S. S. Yaka,* a stevedore brought suit in rem against the S. S. Yaka, which was owned by Waterman Steamship Corporation but which was under bareboat charter to Pan-Atlantic Steamship Corporation. The latter was Reed's employer. Reed alleged that he was injured while working aboard the vessel as a result of the unseaworthiness of the ship. The court held that as charterer of the vessel Pan-Atlantic was the owner pro hac vice.

> Under such arrangements full possession and control of the vessel are delivered up to the charterer for a period of time. The ship is then directed by its Master and manned by his crew; it makes his voyages and carries the cargo he chooses. Services performed on board the ship are primarily for his benefit. It has long been recognized in the law of admiralty that

> for many, if not most, purposes the bareboat charterer is to be treated as the owner * * *. 373 U.S. 410, 412, 10 L.Ed.2d 448, 451.

Therefore, the court held that this charterer was in the same position as the owner of the vessel, owing a duty to shoreside workers performing the tasks of a seaman, to furnish a seaworthy ship. The charterer of the vessel was, in fact, at that time, the owner of the vessel and was Reed's employer. Under such facts, the court held that Reed was entitled to recover against Pan-Atlantic not withstanding Section 905 of the Longshoremen's and Harbor Workers' Compensation Act. This followed the decision of *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 90 L.Ed. 1099 (1946). To the same effect is *Jackson v. Lykes Bros. Steamship Company,* supra.

Under the facts of the instant case, Section 905 of the Longshoremen's and Harbor Workers' Act is pertinent, the liability of the employer being limited to that act, insofar as recovery may be had under Federal remedies.

In the above decisions of the Federal Court, the plaintiff sued legal entities having full possession and control of the vessel, not just possession and control of the vessel for the purpose of repairs.

Appellant contends that the holding in Sanderlin vs. Old Dominion Stevedoring Corporation, 385 Fed.2d 79 (1967) at page 82, authorizes the bringing of his suit under the general maritime laws of the United States by this language:

> There can be no doubt that the stevedore is the appropriate enterprise within the maritime industry to

> bear the cost of this accident. Yet respondent argues that the only way it may be held liable in the admiralty courts is for Sanderlin to sue his employer, the shipowner, for the unseaworthiness resulting from improper stevedoring by Old Dominion and then for his employer to seek indemnification for Old Dominion. This strikes us as needless and undesirable circuity.

This Sanderlin suit was based on breach of an expressed warranty in the stevedore contract. The stevedoring concern was servicing the vessel. The court held on page 81:

> Maritime jurisdiction when founded upon contract depends upon the nature and subject matter of the contract. North Pacific S. S. v. Hall Bros. Co., 249 U.S. 119, 39 S.Ct. 221, 63 L.Ed. 510 (1919). The contract sued on here provides in pertinent part:
>
> > "It is mutually agreed between SMI and the Stevedore that the Stevedore will load and/or discharge in a safe, proper and workmanlike manner with all possible dispatch cargoes of vessels for which SMI acts as agent in the port named * * *."
>
> Since it is well-settled that a stevedoring contract is maritime in nature and governed by general maritime principles, American Stevedore v. Porello, 330 U.S. 446, 67 S.Ct. 847, 91 L.Ed. 1011 (1947) the question in this case is not, as formulated below, whether admiralty has jurisdiction over this action for pier-side personal injuries. Rather, given a concededly maritime contract, the issue for determination is whether the substantive laws of admiralty permit a shipowner's employee of this type to recover directly on the contract from a stevedoring company which has expressly warranted a "safe, proper and workmanlike" performance. Had this action sounded in tort, the locale of the injury would have been juris-

> dictionally dispositive. See, e.g., Hastings v. Mann, 340 F.2d 910 (4th Cir.), cert. denied, 380 U.S. 963, 85 S.Ct. 1106, 14 L.Ed.2d 153 (1965). However, as the Supreme Court has observed, the "action is not changed from one for a breach of contract to tort simply because recovery may turn upon the standard of the performance of [the] stevedoring service." Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U.S. 124, 134, 76 S.Ct. 232, 237, 100 L.Ed. 133 (1956). That the injury occurred on the pier is therefore of no relevance here.

Levingston, in accepting the job from Harms, did not expressly warrant a "safe, proper and workmanlike performance" and did not repair the tug while operative in the water.

The instant Guillory action is readily distinguishable. Here, Guillory was a shore based worker seeking a maritime remedy. The vessel was not in navigation. The plaintiff was not injured while performing duties aboard a vessel in navigation. He was not a seaman, for he was not exposed to the traditional perils of the sea. This vessel was temporarily withdrawn from navigation, and seamen no longer had any duties to perform with respect to it. *United New York and New Jersey Sandy Hook Pilots Association v. Halecki,* 358 U.S. 613, 3 L.Ed.2d, 541 (1959). Appellant's points of error 6 and 7 are immaterial to this decision and are not considered. Appellant's first five points of error are each overruled.

Judgment of the trial court affirmed.

JAMES F. PARKER
Associate Justice